IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

LETTERS PATENT APPEAL NO.24 OF 2001

Shetty Bhavani Patil .. Appellant

v/s.

Indrabai w/o.Ramrao Patil,
deceased through her legal heirs

1a) Amarsinha Kankoji alias
Baburao Bapurao Deshmukh
& ors. .. Respondents

Mr.A.V.Anturkar for the appellant.

Mr.N.N.Shimpi i/by Mr.P.K.Dhakephalkar for the respondents.

CORAM : R. M. LODHA AND
R.S. MOHITE,JJ.

DATED : 21st April 2005

P.C.

Heard Mr.A.V.Anturkar, the learned counsel for the appellant. We also perused the judgment dated 11th March, 1998 passed by the learned Single Judge and also the judgment passed by the Joint Civil Judge, Senior Division, Solapur passed on 8.8.1980.

2. Two-fold contention is raised before us by the learned counsel for the appellant. Firstly, it is contended that the question regarding the execution of the Will dated 8.4.1974 (Exhibit 82) and its genuineness could not have been gone into by the trial court. Secondly, no decree for symbolic possession could have

been granted in favour of the respondent Nos.(1a) and (1b) herein.

3. In so far as first contention is concerned, it may be noticed that initially suit was filed by Indrabai ('original plaintiff') impleading Shetty Bhawani Patil, Raosaheb Madhavrao Deshmukh and Bharubai as the defendants. The original plaintiff died during the pendency of the suit. The present respondent Nos.(1a) and (1b) applied for the substitution in place of the original plaintiff. The substitution was claimed by the present respondent Nos.(1a) and (1b) on the basis of the Will dated 8.4.1974 (Exhibit 82). An enquiry under Order 22 Rule 5 C.P.C. is restricted TO find out the legal heirs of the deceased party for the purposes of continuation of the suit. However in the present case, in the written statement filed by original defendant No.1 and the original defendant No.2 (since deceased and represented by the present appellants) the plea was raised that present respondent Nos.(1a) and (1b) are not the legal heirs of the original plaintiff Indrabai. It was their stand that the original defendant No.2 being adopted son of Indrabai was the only legal heir and entitled to succeed to her properties left by her. This being the contest between the parties in the trial court, the trial court had to go into the question of execution and attestation of the Will said to have been

executed by Indrabai and its genuineness thereof. It is too late in the day now for the appellants to contend that the trial court had no jurisdiction to examine the execution and attestation of the Will said to have been executed by Indrabai. The first contention is, therefore, rejected.

4. As regards the second contention, suffice it to say that this contention was never raised in the first appeal by the appellant. It was not even argued before the learned Single Judge. The second contention, therefore, cannot be permitted to be raised. It is rejected accordingly.

5. The appeal does not deserve to be admitted and is dismissed in limine.

(R.M. LODHA,J.)

(R.S. MOHITE,J.)